IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 94324
	)	
MICHAEL E. AMICK,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
OREGON COUNTY, MISSOURI
THIRTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE J. MAX PRICE, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Samuel Buffaloe, Mo. Bar No. 63736
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 777-9977
Fax (573) 777-9974
Email: Sam.Buffaloe@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

RULES:

JURISDICTIONAL STATEMENT

Michael Amick appeals his convictions for arson in the second degree, Section 569.050, and murder in the second degree, Section 565.021.[1] This case was tried by an Oregon County jury before the Honorable J. Max Price, Senior Judge, on June 27-July 1, 2011. (LF 23). On August 30, 2011, Judge Price sentenced Mr. Amick to concurrent sentences of seven years and life in prison. (TR 1092; LF 254-256).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, section 3, Mo. Const.; section 477.060. This Court thereafter granted Mr. Amick's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

[1] Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Michael Amick was charged by first amended information with arson in the second degree, Section 569.050, and murder in the first degree, section 565.020. (LF 179-180). The case was tried by an Oregon County jury before the Honorable J. Max Price, Senior Judge, on June 27-July 1, 2011. (LF 23). The following evidence was presented at that trial:

Leona Maxine Vaughan (victim), her daughter Jackie Risner, and some of Jackie's children lived at Jackie's residence in Myrtle, Oregon County, Missouri (Risner home). (TR 260-261, 359). Jackie's daughter Sara is married to Mr. Amick; they lived at another residence. (TR 370).

On December 2, 2011, at about 10:30 a.m., Jackie left her home to work at a bar (TR 364-365). Her son Josh Lane went with her, which was unusual, leaving victim home alone. (TR 365, 373).

Later that day, Kent Risner, Jackie's ex-husband, telephoned the Risner home at about 10:56-10:57 a.m. (TR 259, 261-264). Victim answered the phone and spoke with Risner for a couple of minutes. (TR 265-267).

About a mile away from the Risner home, Jake Mayberry lived in a trailer on his parents' property. (TR 289-291). He was a friend of Jackie and Josh; Mr. Mayberry and Josh smoked marijuana together. (TR 374, 381, 382). Within the same hour that Jackie and Josh left to work at the bar, Mr. Mayberry decided to ask his parents if they needed anything done. (TR 290-291). His father said he could go to the store to get some items to help cut wood. (TR 291-292).

Sometime around "11ish," Mr. Mayberry drove to the Myrtle convenience store/gas station, which was about six miles away. (TR 292-293, 300). Mr. Mayberry claimed that as he drove by the Risner home, he saw what he believed to be Mr. Amick's truck parked beside it. (TR 297, 312). The back of the truck was facing the road. (TR 298, 310-311). Mr. Mayberry was driving about forty-five miles per hour and the house was about thirty to fifty yards from the road. (TR 329-331, 354, 356). He could see it for about five or six or a "couple of" seconds. (TR 345-346, 349, 355).

Mr. Mayberry described the truck as a Chevrolet truck with a "[k]ind of silverish color with a black brush guard . . . having shiny rims." (TR 311, 327-328, 345). He said it was a two-door truck with an "extended cab" (TR 311-312, 326-327).[2] At trial, Jake admitted that his description of the truck was wrong as to some details, but he insisted it was Mr. Amick's truck. (TR 348).[3]

---

[2] Mr. Amick's truck had four-doors; it is a crew cab, not an extended cab truck, as verified by witnesses who testified it had four-doors: Jackie (TR 380); Oregon County Chief Deputy Eric King (TR 549); Linda Amick (TR 749); and Chris Amick (TR 909-911; Exhibits Q and R). Mr. Mayberry was the only person who testified that Mr. Amick's truck had two doors. The State introduced into evidence the Missouri Department of Revenue records for the truck (Exhibit 32), and an examination of the VIN, 1GCGK23R0YF411132, reveals that the seventh

Mr. Mayberry guessed that it took him about five minutes to drive to the store, and that he was only at the store for another five minutes. (TR 300-301). Among the items purchased, Mr. Mayberry bought some gasoline. (TR 299). A receipt from the convenience store showed he had purchased items at 11:20:52. (TR 301-302, 456).

On his way home, Mr. Mayberry testified that he noticed smoke coming out between the pieces of tin on the roof of the Risner home. (TR 303-304). He said he pulled into the driveway, but he decided that there was nothing he could do, so he drove to his parents' house and told his father. (TR 304-305). His father went to the fire and Mr. Mayberry drove to the bar and told Jackie that there was smoke coming out of her attic. (TR 305-306, 366).

At 11:32 a.m., Kent Risner called the bar where Jackie was working. (TR 267-268, 367). Jackie screamed that there was smoke coming out of her attic, and she hung up. (TR 269-270, 367-368).

---

character, which shows the body style, has a "3" which represents a four-door cab. service.gm.com/dealerworld/vincards/ pdf/vincard00.pdf.

[3] At a deposition, Mr. Mayberry said that day he had marijuana "in his system" and he "maybe" would pass a breathalyzer test; at trial he denied he had smoked marijuana that day and he thought he would have passed a breathalyzer test. (TR 314, 321-322).

At about 1:15 p.m., Ellen Nelson saw Mr. Amick driving in his truck. (TR 444, 446-447, 450). When they stopped to talk, Ms. Nelson told him that Jackie's home had burned down and that Jackie's mother had been in it (TR 448). Ms. Nelson also told him that she had heard that his truck had been seen there. (TR 448-449). Mr. Amick said that he had not been near it. (TR 449, 451).

Victim's body was found in the remnants of the Risner home. (TR 386-387, 408). A later autopsy revealed that she died from six gunshot wounds to the head. (TR 388, 393, 394, 396, 398). Six bullet fragments were retrieved from her head. (TR 398, 403). She had been killed before the fire burned the house. (TR 396-397-398).

State Fire Marshall Investigator Michael Johnson examined the Risner home. (TR 408). There was an operating wood stove, but Mr. Johnson determined that was not where the fire started. (TR 409). Mr. Johnson was unable to determine if any of the appliances had started the fire. (TR 409-410). He did not find any traces of accelerants or pour patterns or anything of that nature. (TR 410, 420). He was unable to determine where the fire started or its cause. (TR 415-416). Other than the fireplace, he was unable to rule out things that might have caused the fire. (TR 415). Mr. Johnson believed that it was "quite a coincidence that the fire would occur at the same time" someone had been shot inside the home. (TR 416). But Mr. Johnson could not say that the fire was the result of arson. (TR 419). He did not know how the fire started. (TR 420).

The night of the fire, Oregon County Chief Deputy Eric King spoke with Mr. Amick at his residence because Officer King had been told by Mr. Mayberry that Mr. Amick's truck had been at the crime scene. (TR 453-454). State Fire Marshall Kass Brazeal took photographs of Mr. Amick's pewter-colored truck. (TR 457-459, 553-554; Exhibits 9, 10, 11).

On December 4, 2008, Oregon County Sheriff Tim Ward went to Mr. Amick's home to see if Mr. Amick was going to meet with Deputy King. (TR 596). Officer Ward knocked on the door, but no one answered. (TR 597, 609). When Officer Ward was leaving, he noticed Mr. Amick's truck. (TR 597). Officer Ward glanced inside the bed of the truck and noticed a chainsaw and a cutting torch that was partially covered. (TR 597-598, 609-612).

Later that day, Officer King interviewed Mr. Amick again. (TR 461, 462, 485-486). Officer King elected not to record the statement. (TR 488, 510). Mr. Amick also gave a written statement. (TR 489-491; Exhibit 19).

Regarding the relevant time frame of 10:30 to 11:30 a.m.,[4] Mr. Amick said that he was at his mother Linda Amick's home from around 9:55 a.m. until 10:35 a.m. (TR 491-496). Mr. Amick said that he called his sister Deanna from Linda's

[4] Jackie left home at 10:30 a.m. (TR 267-268, 364-365, 367). Kent Risner spoke with victim at about 10:56-10:57 a.m. (TR 259, 261-264). Jackie was told about the fire at about 11:30 (TR 267-268, 364-365, 367). Thus, the murder would have occurred sometime between around 11:00-11:30 a.m.

home. (TR 491-496). Deanna was with Mr. Amick's wife, Sara. (TR 502-503). Officer King checked Deanna's cell phone and it showed that she received a phone call from Linda's home phone at 10:25 a.m. (TR 503). Linda testified that Mr. Amick made that call, which is consistent with Mr. Amick's written statement which had said that he was at Linda's home until 10:35 a.m. (TR 762-763, 765; Exhibit 19).

Mr. Amick told Officer King that after he left Linda's home, he went to the Myrtle post office to get his mail. (TR 491, 496). He then went home where he changed a tire and checked his email. (TR 491, 496). From there, he went to Linda's to get a chainsaw. (TR 491, 496). After he left there, he met his brother and a friend "Nathan" on a road at about 11:00 or 11:05 a.m. (TR 491, 496). He talked with them for about ten minutes, before they went to a café to eat lunch until 12:20 to 12:25 a.m. (TR 491, 496). Officer King testified that if this timeline were true, then Mr. Amick could not have committed the crimes. (TR 492).[5]

Officer King testified that it took him about the following times to drive between the following locations: three minutes to drive from Linda's home to the post office (TR 498); eight minutes to drive from the post office to Mr. Amick's home (TR 498-499); three minutes to drive from Mr. Amick's home to Linda's

[5] Officer King testified that as far as he knew, Mr. Amick and his brother Chris Amick had good reputations in the community for honesty and truthfulness (TR 536-537).

home (TR 499-500); and, six minutes to drive from Linda's home to where Mr. Amick had met his brother Chris and Nathan Roberts (TR 500). Officer King said that it had taken Officer King about 25 to 30 minutes to drive the route Mr. Amick said he had driven. (TR 501).[6]

On December 5, 2008, a search warrant was executed at Mr. Amick's home and his property. (TR 462). Officers seized firearms, ammunition (.22 and .25 caliber), and a computer. (TR 462-463, 465-467, 502, 504). It was determined that those firearms had not fired the bullets that killed Vaughan (TR 528, 643).

Near a pond in a field about a quarter to a half mile away from Mr. Amick's home, officers found "a burnt spot, probably one to two feet in diameter, full of what appeared to be metal drippings and a hammer spur from a revolver." (TR 436, 468, 470, 598-599, 616).[7] It appeared that someone had cut something with a torch. (TR 469, 471, 598). Officers used a magnet in the pond and found three metal pieces: the grip and frame of a revolver, the cylinder of a revolver, and a portion of the barrel, which had been cut and then sliced lengthwise. (TR 470-472, 475-47, 596, 599-600). Sheriff Ward testified that there was nothing in their

---

[6] Officer King might have included in that total the drive from where Mr. Amick met Chris to the café since the other totals (three, eight, three, and six minutes) add up to only twenty minutes.

[7] There is an unlocked gate on the road leading to the pond; so anyone had access to the pond. (TR 525, 617, 914).

investigation connecting Mr. Amick to the metal pieces or connecting those metal pieces to the murder weapon. (TR 624).

Todd Garrison of the Missouri State Highway Patrol examined the six expended bullet fragments obtained from the autopsy. (TR 626, 628-631). All six were consistent with .22 caliber bullets (TR 632). Mr. Garrison also examined the gun parts found in the pond. (TR 633-634). One of the parts was an intact cylinder, which was compatible with being able to fire .22 caliber cartridges. (TR 633, 635-636). There was substantial damage to the barrel portion that was found. (TR 637). The damage was consistent with having been cut with a torch. (TR 637-638). The barrel was consistent with what Mr. Garrison would expect to be on a .22 caliber firearm. (TR 638). Regarding the frame that was found, Mr. Garrison could not say whether the cylinder would fit into it because of the damage done to the frame. (TR 638-639). The frame was consistent with a .22 caliber weapon. (TR 640). All three parts were consistent with having been part of a .22 H & R revolver. (TR 640-641). But Mr. Garrison could not determine if the parts found in the pond were part of the murder weapon. (TR 643, 655). And Mr. Garrison could not say how long the parts had been in the pond. (TR 660).

Paul Cordia is the supervisor of the computer forensic unit for the Missouri State Highway Patrol (TR 564). He examined Mr. Amick's computer. (TR 565-566, 568). Mr. Cordia verified that the computer's time and date matched the correct time and date. (TR 569-570).

He then examined the computer to see if someone had used the computer on December 2, 2008. (TR 571). At about 7:49 a.m., an internet search had been conducted on that computer. (TR 576). There were also searches done at about 8:02 a.m., 8:05 a.m., 8:09 a.m., and 9:03 a.m. (TR 577-579).

Mr. Cordia also determined that someone had sent two e-mails on that date. (TR 580).[8] Internet activity from Yahoo! was started at 9:09 a.m.; it could not be determined when the activity on that webpage ended. (TR 582, 591). At 9:32 a.m., an e-mail was sent from ms_amick@yahoo.com to lbbrown1@shawneelink.net. (TR 581-582). On the signature line at the end of the e-mail, the name Linda Amick was typed. (TR 583). Within the body of the e-mail it said that the e-mail was coming from the computer at "my son's house." (TR 584). The second email was at 10:23 a.m. from mrs_amick@hotmail to ms_amick@yahoo.com. (TR 585-586). The body of the e-mail again noted that the e-mail was coming from "my son's computer." (TR 587). Mr. Cordia did not know if anything would be stored on the computer if there had been an unsuccessful attempt to send an e-mail. (TR 594). Mr. Cordia did not find anything on the computer implicating Mr. Amick in the murder and alleged arson; he "didn't find a smoking gun." (TR 593).

Steve Russell is Vice President at the Bank of Thayer where victim was a customer (TR 710-711). On March 7, 2008, victim entered into a car loan

[8] There was a third e-mail, possibly spam, which the computer had *received* later that night (TR 587-589).

agreement with the bank to purchase Mr. Amick's and Sara's van, which they owned "free and clear" and was used to secure the loan. (TR 711, 713, 715, 722). About $20,000 was distributed, with about $15,000 going to Mr. Amick, and about $5,000 going to victim to pay off a previous car loan. (TR 714-715). Victim also purchased credit life insurance that would pay off the loan if she died. (TR 716).

This loan was for sixty payments of $412.53. (TR 716). The first payment was in cash and made on April 9, 2008. (TR 717). On May 19, 2008, a payment of $425 was made through a check on Mr. Amick and Sara's account and signed by Mr. Amick. (TR 717). A cash payment of $425 was made on June 12, 2008 (TR 717-718). On July 9, 2008, a payment of $415 was made by a check on Amick Farm signed by Mr. Amick. (TR 718). On August 18, 2008, a payment of $415 was made with a check on Mr. Amick and Sara's account and signed by Mr. Amick. (TR 718). On September 16, 2008, a payment of $415 was made with a check on Mr. Amick and Sara's account and signed by Mr. Amick. (TR 718). On October 14, 2008, a payment of $412 was made with a check on Mr. Amick and Sara's account and signed by Mr. Amick, and an additional $.53 in cash was paid too. (TR 718-719).

Sometime around November 20, 2008, Mr. Russell called victim about a late November payment. (TR 719-720). She said, "I'm sorry. I'll get that payment made." (TR 720).

Shortly after victim's death, Mr. Amick called Mr. Russell and told him that victim had died in a fire and he asked if there was credit insurance on the loan. (TR 720-721). Mr. Russell told him that there was, and so the remainder of the loan, $18,591.99, would be paid in full. (TR 721).

Wayne Seelye was an inmate in the jail with Mr. Amick after Mr. Amick was arrested for these charges. (TR 676, 680-682). Mr. Seelye was there because of a probation violation. (TR 677). He believed he had at least five felony convictions, but he did not think he had as many as ten felony convictions. (TR 677, 690). At the time of trial, he had a pending DWI charge – he had five prior DWIs. (TR 677-678). The prosecutor and the Assistant Attorney General helped arrange him to be released on his own recognizance so he could testify. (TR 678-679).

According to Mr. Seelye, Mr. Amick told him, "They're accusing me of killing that crazy bitch. And fuck her, she owes me anyway. She owed me for it anyway . . . and they ain't going to prove it." (TR 683-684). After his recollection was refreshed by a written statement, Mr. Seelye also testified that Mr. Amick said that victim had owed him money for a camper and that she "had it coming a long time ago." (TR 685).

Mr. Seelye said that on another occasion, after Mr. Amick returned to the jail cell from a phone call, he said that a gun had been found in a pond, but that the gun "[d]idn't have a damn thing to do with that anyway. That was there for

another reason. We put that there for a different reason." (TR 686-687). Mr. Amick never said that he killed victim (TR 703-704, 706-707).

At trial, Mr. Amick presented an alibi defense for December 2, 2008.

His mother, Linda Amick, testified that on that day, she went to Mr. Amick's home around 7:30 a.m. because she was having computer problems. (TR 743, 756). Mr. Amick was there the entire time she was there. (TR 743, 757-758). While there, Linda tried twice to send two e-mails to Rita Brown, but she was unsure if they went through. (TR 759, 762). She believed she sent them around 9:30 a.m. (TR 760). Linda went home around 10:00 a.m. (TR 745, 756).

Mr. Amick went to Linda's home sometime between 10:00 and 10:30. (TR 745-746, 758). At about 10:45, he left Linda's to go to the post office (TR 745-746, 758).[9]

Postmaster Fredona Riley testified that Mr. Amick was at the Myrtle Post Office to get his mail between 10:49 and 11:05 a.m.; she knew the exact time range because she had been on the phone with a customer and she was able to confirm the time that the customer had used their cell phone. (TR 811, 813, 815-

[9] Deputy King testified that it took him about three minutes to drive from Linda's to the post office. (TR 498).

816, 823). Ms. Riley estimated that it would take about five to seven minutes to drive from the post office to the Risner home. (TR 819-820).[10]

George Cue was doing a remodeling job at Deanna Amick's trailer home; she is Mr. Amick's sister (TR 825). At about 11:00-11:05 a.m., Mr. Cue saw Mr. Amick in his truck. (TR 826-827, 832).

Linda testified that Mr. Amick returned to her home sometime around 11:00 a.m. (TR 746-747, 759). Mr. Cue saw Mr. Amick at Linda's home; he thought it was about 11:15 a.m. (TR 827-828, 833, 835). Mr. Amick was there to borrow a chain saw. (TR 828). Mr. Cue went to have lunch around 11:30 a.m.; he was not sure if Mr. Amick had left. (TR 828, 833-834).

Chris Amick and his friend Nathan Roberts testified that they saw Mr. Amick near the Arkansas/Missouri border around 11:00-11:05 a.m. (TR 848-849, 866, 917).[11] Chris and Nathan were heading to lunch when they stopped to talk with Mr. Amick. (TR 849). They talked about ten minutes. (TR 917-918). Mr. Amick followed them to have lunch at a café. (TR 850-851, 854, 918). They

---

[10] Ms. Riley also testified that she had seen trucks that were similar to Michael's truck (TR 861). Other witnesses gave testimony about similar trucks in the area. (TR 749, 861, 915).

[11] Deputy King testified that it took him about six minutes to drive from Linda's home to where Michael had met Chris and Nathan. (TR 500).

arrived there around 11:20-11:25 and were there until about 12:30 p.m. (TR 854, 856-857, 918-919).

Tim Garrison, who works for Arkansas Highway and Transportation, saw Mr. Amick on his way to eat lunch in Myrtle, Missouri. (TR 730-731). Mr. Garrison saw Mr. Amick and Chris Amick parked and talking with each other on a dirt road at state line, which is about four miles away from Myrtle. (TR 731). Mr. Amick was in his truck (TR 732). It was about 11:18 or 11:20 a.m. (TR 732-735). After lunch, Mr. Garrison helped fight the fire at the Risner residence. (TR 733, 737). The Risner residence was about two miles from where Garrison saw Mr. Amick and Chris (TR 739).

Donna Hall was a waitress at Janie's Café in Myrtle. (TR 873). She testified that Chris and Nathan arrived there at about 11:10 a.m., and Mr. Amick arrived about 11:15 or 11:20 a.m. (TR 875, 878, 881). Ms. Hall believed they left the café around 11:45 a.m. (TR 875). But Ms. Hall agreed that when she had given a statement to the Fire Marshall on December 4, 2008, she said that Nathan and Chris arrived at 11:25 a.m., and Mr. Amick arrived there at 11:30-11:40 a.m. (TR 880). She now believed that Mr. Amick arrived probably between 11:20-11:30 a.m. (TR 882-883).

Max Huffman, the co-owner of Janie's café, testified that Chris and Nathan arrived there at 11:25 a.m., and Mr. Amick arrived a minute or two later. (TR 885-886, 890-891). Mr. Huffman believed that Mr. Amick was there about 30 minutes.

(TR 891). Mr. Huffman had also seen a pickup similar to Mr. Amick's in the area a couple times. (TR 893).

Phyllis Crowder was at Janie's café. (TR 896). She testified that after Nathan and Chris arrived there, Mr. Amick arrived about five minutes later, at about 11:20-11:25 a.m. (TR 896, 898). Mr. Amick joked around with her and put his hands on her shoulders. (TR 896). Ms. Crowder testified that Mr. Amick did not smell unusual. (TR 897).

In rebuttal, over Mr. Amick's objection, the State played an audiotape of a jailhouse phone call between Mr. Amick and Deanna on March 3, 2011. (Exhibit 43; TR 952-960, 976, 979). During that conversation, Deanna told Mr. Amick that law enforcement officers were looking for Mr. Amick's truck. (Exhibit 43). Deanna told an officer that she did not know where it was. *Id*. She complained that the officer was trying to get photos of the truck so that Jake could study them and get the description of it correct. *Id*.

Mr. Amick commented that it was hard to subpoena someone to get a truck when they did not know whom to subpoena. *Id*. Deanna told Mr. Amick that she did not know where the truck was, and she did not care. *Id*. She did not regret telling her family that the truck needed to disappear. *Id*. She chose not to know anything about the disappearance. *Id*. But she was the one who said that the truck needed to disappear because Jake could not get an accurate description of the truck, and she did not want it sitting around any more for people to study it. *Id*.

After this evidence was presented at Mr. Amick's trial, the trial court overruled Mr. Amick's motion for judgment of acquittal at the close of the evidence. (LF 181-182; TR 979).

Evidentiary Matters

During closing argument, the assistant attorney general accused defense counsel and Mr. Amick's family of "creating a fraud in this court," (TR 993), changing license plates on a truck and taking a photo of it (TR 993-994), being "corrupt and deceitful,"' (TR 998), "showing photos of a truck with Mr. Amick's license plate that is not Mr. Amick's truck," (TR 998), "tampering with evidence," (TR 998), committing "a crime," (TR 998), "Hindering prosecution," (TR 998), in engaging in "fraudulent behavior" (TR 1024), defense counsel "misleading" the jury, not telling them everything, and getting "caught with their pants down," (TR 1022), and defense counsel not telling "the full truth, which they have yet to do." (TR 1022). In order to avoid undue repetition, the relevant portions of the closing argument are set out in more detail in the argument section of this brief.

Before jury deliberation began, alternate juror, No. 14, was excused by the trial court. (TR 1025). No. 14 told the court that she was "pleased to be dismissed." (TR 1025). After almost five hours of deliberation (TR 1040), the bailiff informed the court that Juror No. 12 told the bailiff that he was a diabetic and was not feeling well and he did not know if he would be able to make a decision or not "with the arguing going back and forth." (TR 1032).

The jury was brought into the courtroom. (TR 1037). Juror 12 confirmed that he was a diabetic. (TR 1037). He said that he was dizzy and felt like he was going to pass out. (TR 1037). He said, "I don't feel like I can make a decision either way, really." (TR 1037). He had his medication with him, but it was "slow-acting," and he took it three times a day. (TR 1037-1038).

The trial court asked if the jury was making progress. (TR 1038). An unidentified juror said, "You, are you making any progress?" (TR 1038). Juror 12 replied, "Well, I haven't change my mind any, to start off with –" (TR 1038). The trial court interrupted and told the jury that the court did not want the jury to start deliberating in open court. (TR 1038). Juror 12 said that he probably could deliberate for a little bit longer without passing out, but he did not feel well. (TR 1038-1040). The jury was then returned to deliberate (TR 1040).

Later, Juror 14 was contacted by telephone. (TR 1043). She told the court that she had discussed the case "somewhat" with others after she left the courtroom. (TR 1044). Her son had called her and asked her if she was "still in," and she told him that she was an alternate and had been released. (TR 1044). She also told her boss that she had been released. (TR 1044). And she called a friend and asked them to notify her when they heard the verdict. (TR 1044). She did not "know of anything else that I've said that would hurt the case." (TR 1044). The trial court asked her to drive back to the courthouse. (TR 1045). She assured the court she would not discuss the case with anyone (TR 1045). She volunteered, "This is my worst nightmare." (TR 1045).

About 35 minutes later, Juror 14 arrived at the courthouse at 5:35 p.m. (TR 1047). She again noted that she had told her boss she had been excused and it was "a relief." (TR 1048). She said, however, that she had not discussed the "facts" of the case with anyone. (TR 1048).

The court and the attorneys then discussed the matter out of the presence of Juror 14. (TR 1048-1049). Defense counsel complained that because the jury had been deliberating for five and a half hours, the court should not substitute the alternate in place of Juror 12 and requested a mistrial. (TR 1051). Defense counsel said that the only two options for the court was a mistrial or to send the jurors home, instruct them not to discuss the case with anyone, and by the time they reconvened Juror 12 could be ready to continue deliberation. (TR 1052-1053).

The trial court overruled the motion for mistrial (TR 1056).

All 13 jurors were brought into the courtroom at 5:55 p.m. (TR 1057). Juror No. 12 said he was feeling no better and he could not focus. (TR 1058). The trial court excused Juror 12. (TR 1058). The trial court told the remaining jurors that it was the court's fault that Juror 14 had been allowed to leave. (TR 1058). Juror 14 replied, "Well, I was really glad to go home." (TR 1058).

The trial court told the jury, "I'm going to ask the clerk to swear all 12 of you again and send you back to continue your deliberation." (TR 1059). The new jury was sworn. (TR 1059). It was 6:00 p.m. (TR 1060).

Out of the jury's presence, the court commented,

> But I don't know how to instruct eleven jurors to tell one juror what they've discussed for, Mr. Wood, you said five and a half hours, give or take thirty minutes. I don't know that an instruction is even available to say to eleven people, "[y]ou go back there and tell her everything that's happened. Ma'am you pay attention."

(TR 1060).

Approximately ten minutes later (TR 1075, 1076; LF 244), the jury returned with its verdicts finding Mr. Amick guilty of arson and the lesser-included offense of murder in the second degree. (TR 1063-1064; LF 215-216). After the jury was polled, the trial court asked Juror 14 if she had sufficient time to go over all the instruction, the evidence, and discuss it fully with the other 11 jurors. (TR 1064). Juror 14 replied, "I pretty much remembered everything that was going on and I really knew how I felt when I came back." (TR 1065).

After the jury was released, defense counsel moved for a new trial. (TR 1075-1076). He noted that the jury had been deliberating for about five and a half hours while Juror 14 was gone, and when Juror 14 joined the deliberation, it took ten minutes or less for the verdicts. (TR 1075). He characterized it has a "sham of deliberation." (TR 1975). He argued that there was no way that Juror 14 had time to read through the instructions, listen to the opinions of the other jurors, and reach a conclusion. (TR 1075). He could almost guarantee that when Juror 14 left she did not have it in her mind that Mr. Amick was guilty of the lesser offense of murder in the second degree. (TR 1975). There was simply no way that she had

time to deliberate or that she did deliberate. (TR 1075. 1076). Juror 14 deliberated for less than ten minutes before the jury came back with verdict after six hours of total deliberation. (TR 1076). The trial court denied the motion for mistrial (TR 1977).

Mr. Amick filed a timely motion for new trial (TR 1062, 1067; LF 217-234, filed on, July 19, 2011), and a timely amended motion for new trial (LF 235-253, filed on July 25, 2011). In those motions, Mr. Amick raised a claim of error concerning allowing the alternate juror back on the case after she had left the courthouse for several hours and deliberated with the jury for only about ten minutes out of the total about six hours of deliberation (paragraphs 58-62) (LF 235-244).

On August 30, 2011, Judge Price overruled Mr. Amick's motions for new trial and sentenced him to concurrent sentences of seven years and life in prison. (TR 1085, 1092; LF 254-256). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

Point I.

The trial court erred in overruling Mr. Amick's objections and requests for mistrial when it substituted alternate Juror 14, who had left the courthouse for hours while the jury was deliberating, for Juror 12 after the jury deliberated for almost six hours without her, because this violated Mr. Amick's right to due process and a fair trial before an impartial and qualified jury, as guaranteed by the 6th and 14th Amendments to the U.S. Const., and Art. I, sections 10 and 18(a) of the Mo. Const., and it was contrary to section 494.485, in that Mr. Amick was entitled to have the same jury throughout deliberations; he was prejudiced because Juror 14 had left the courthouse after she was discharged and discussed the case with others; when discharged, she expressed relief to the court and to her boss; when she was told that she might rejoin the jury, she said that it was her "worst nightmare;" after Juror 14 replaced Juror 12, the court did not instruct the new jury to deliberate anew, but told them to "continue your deliberation;" the jury reached a verdict in about 10 minutes; and when Juror 14 was questioned by the court whether she had sufficient time to discuss the case with the other jurors, she said, "I pretty much remembered everything that was going on and I really knew how I felt when I came back."

Cantrell v. State, 265 Ark. 263, 265-66, 577 S.W.2d 605, 607 (1979);

People v. Burnette, 775 P.2d 583, 587-590 (Colo. 1989)(en banc);

State v. Bobo, 814 S.W.2d 353 (Tenn. 1991);

State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10 and18(a);

Section 494.485; and

Rules 29.11 and 30.20.

Point II.

The trial court plainly erred in not *sua sponte* declaring a mistrial after the Assistant Attorney General accused defense counsel and Mr. Amick's family of "creating a fraud in this court," changing license plates on a truck and taking a photo of it, being "corrupt and deceitful," "showing photos of a truck with Mr. Amick's license plate that is not Mr. Amick's truck," "tampering with evidence," committing "a crime," "hindering prosecution," engaging in "fraudulent behavior; defense counsel "misleading" the jury, not telling the jury everything, getting "caught with their pants down," and, not telling "the full truth, which they have yet to do," because Mr. Amick was thereby denied his right to due process and a fair trial, as guaranteed by the 14th Amendment to the U.S. Constitution and Article I, section 10 of the Missouri Constitution, in that the State's argument improperly made unwarranted, unsupported personal attacks on defense counsel and Mr. Amick's family, and referred to facts not in evidence, resulting in a manifest injustice.

State v. Greene, 820 S.W.2d 345 (Mo. App. S.D. 1991);

State v. Hornbeck, 702 S.W.2d 90 (Mo. App. E.D. 1985);

State v. Nelson, 957 S.W.2d 327 (Mo. App. E.D. 1997);

State v. Harris, 662 S.W.2d 276 (Mo. App. E.D. 1983);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

Rule 30.20.

Point III.

The trial court plainly erred by abandoning its duty of neutrality and injecting itself in the proceeding when it commented in the jury's presence that the State's only eyewitness (Jake Mayberry) had "answered consistently each time" he had been asked to describe the truck he saw at the victim's home, which was the sole means of identification, and that Mayberry had "established he can describe the vehicle," in violation of Mr. Amick's right to due process of law, as guaranteed by the 14th Amendment of the United States Constitution and Art. I, section 10 of the Missouri Constitution, in that the trial court's comments on the evidence were inherently prejudicial and added substantive support to the State's case and Mayberry's credibility and ability to identify the truck, the lynchpin of the State's case, resulting in a manifest injustice.

State v. Bearden, 748 S.W.2d 753 (Mo. App. E.D. 1988);

State v. Lomack, 570 S.W.3d 711 (Mo. App. St.LD. 1978);

State v. Houston, 139 S.W.3d 223 (Mo. App. W.D. 2004);

State v. Embry, 530 S.W.2d 401 (Mo. App. E.D. 1975);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

Rule 30.20.

ARGUMENT

Point I.

The trial court erred in overruling Mr. Amick's objections and requests for mistrial when it substituted alternate Juror 14, who had left the courthouse for hours while the jury was deliberating, for Juror 12 after the jury deliberated for almost six hours without her, because this violated Mr. Amick's right to due process and a fair trial before an impartial and qualified jury, as guaranteed by the 6th and 14th Amendments to the U.S. Const., and Art. I, sections 10 and 18(a) of the Mo. Const., and it was contrary to Section 494.485, in that Mr. Amick was entitled to have the same jury throughout deliberations; he was prejudiced because Juror 14 had left the courthouse after she was discharged and discussed the case with others; when discharged, she expressed relief to the court and to her boss; when she was told that she might rejoin the jury, she said that it was her "worst nightmare;" after Juror 14 replaced Juror 12, the court did not instruct the new jury to deliberate anew, but told them to "continue your deliberation;" the jury reached a verdict in about 10 minutes; and when Juror 14 was questioned by the court whether she had sufficient time to discuss the case with the other jurors, she said, "I pretty much remembered everything that was going on and I really knew how I felt when I came back."

A. Relevant Facts

Before jury deliberation began, alternate juror, No. 14, was excused by the trial court. (TR 1025). No. 14 told the court that she was "pleased to be dismissed" (TR 1025). The transcript does not reflect what time this occurred, but later statements made by the trial court reveal that it was about noon when this happened. (TR 1040, 1043).

At 4:20 p.m., the bailiff informed the court and the attorneys that Juror No. 12 told the bailiff that he was feeling weak, dizzy, that he was a diabetic and said that he had pills he took for it, but he did not know if it would help at this time. (TR 1032). The bailiff said that Juror 12 did not know if he would be able to make a decision or not "with the arguing going back and forth." (TR 1032).

The state suggested that the court bring the whole jury into the courtroom, so that the other jurors would not be discussing the case without Juror 12, and so the court could get further information from Juror 12. (TR 1033). The court asked about a "Hammer instruction," but the state did not believe the court should give that unless the jury was saying that they could not deliberate. (TR 1034).

The jury was brought into the courtroom. (TR 1037). Juror 12 confirmed that he was a diabetic. (TR 1037). He said that he was dizzy and felt like he was going to pass out. (TR 1037). He noted that he usually ate around 5:00 p.m. and that he took pills. (TR 1037). He complained about the nerves and arguing, and thought he was going to pass out. (TR 1037). He said, "I don't feel like I can make a decision either way, really." (TR 1037).

He had his medication with him, but it was "slow-acting," and he took it three times a day. (TR 1037-1038). He did not think that anything like a sandwich would help either. (TR 1038).

Juror 12 confirmed that he had been able to participate in deliberation, but noted that he was "just awful nervous," and he was not "used to all the arguing and everything." (TR 1038).

The trial court asked if the jury was making progress. (TR 1038). An unidentified juror said, "You, are you making any progress?" (TR 1038). Juror 12 replied, "Well, I haven't change my mind any, to start off with –" (TR 1038). The trial court interrupted and told the jury that the court did not want the jury to start deliberating in open court. (TR 1038). Juror 12 said that he probably could deliberate for a little bit longer without passing out, but he did not feel well. (TR 1038-1040). The jury was then returned to deliberate. (TR 1040).

The court noted that they had deliberated for about ten minutes short of five hours. (TR 1040). Defense counsel was concerned that Juror 12 would not be able to meaningfully participate in deliberations. (TR 1041). The court stated that it was considering have the clerk telephone the excused alternate since she would be at court in 25 or 30 minutes, although the court recognized that defense counsel was not in agreement with doing that. (TR 1041). Defense counsel believed that it would be error to have Juror 14 return since she had been already gone for at least four and a half hours and had not participated in deliberations at all (TR 1042).

The court did not rule at that time. (TR 1042-1043). The court noted that it was 4:45 p.m. (TR 1043).

Later, Juror 14 was contacted by telephone; it was 4:50 p.m. (TR 1043). She told the court that she had discussed the case "somewhat" with others after she left the courtroom. (TR 1044). Her son had called her and asked her if she was "still in," and she told him that she was an alternate and have been released. (TR 1044). She also told her boss that she had been released. (TR 1044). And she called a friend and asked them to notify her when they heard the verdict. (TR 1044). She did not "know of anything else that I've said that would hurt the case." (TR 1044). The trial court asked her to drive back to the courthouse. (TR 1045). She assured the court she would not discuss the case with anyone. (TR 1045). She volunteered, "This is my worst nightmare" (TR 1045).

About 35 minutes later, Juror 14 arrived at the courthouse at 5:35 p.m. (TR 1047). She again noted that she had told her boss she had been excused and it was "a relief." (TR 1048). She said, however, that she had not discussed the "facts" of the case with anyone. (TR 1048).

The court and the attorneys then discussed the matter out of the presence of Juror 14. (TR 1048-1049). Defense counsel complained that because the jury had been deliberating for five and a half hours, the court should not substitute the alternate in place of Juror 12 and requested a mistrial. (TR 1051). Defense counsel posited that there probably had been thousands of words, hundreds of different arguments, different theories, and different opinions put forth and deliberated over

the course of those five and a half hours, and that it would be impossible for the alternate to get caught up and get back what had been lost. (TR 1052). Defense counsel said that the only two options for the court were a mistrial or to send the jurors home, instruct them not to discuss the case with anyone, and by the time they reconvened, Juror 12 could be ready to continue deliberation. (TR 1052-1053). Those were the only two options that would protect Mr. Amick's right to a fair trial and a trial before twelve fair and impartial jurors who had fully deliberated on that evidence. (TR 1052). Defense counsel also noted that when Juror 14 was released, she was never instructed not to discuss the case. (TR 1053).

The state suggested that they excuse Juror 12, replace him with the alternate Juror 14 and instruct the jury to "start anew." (TR 1053-1054).

Defense counsel noted that if there are alternate jurors that are needed for deliberation, those jurors should be kept in the building but in a separate room; they should not be allowed to leave the building and go home for hours. (TR 1054). Defense counsel was entitled to a fair and impartial jury, and that could not be ensured. (TR 1055).

The trial court overruled the motion for mistrial. (TR 1056).

All 13 jurors were brought into the courtroom at 5:55 p.m. (TR 1057). Juror No. 12 said he was feeling no better and he could not focus. (TR 1058). The trial court excused Juror 12. (TR 1058). Juror 12 said that maybe if he was outside for a while he would feel better. (TR 1058). The trial court told the remaining jurors

that it was the court's fault that Juror 14 had been allowed to leave. (TR 1058). Juror 14 replied, "Well, I was really glad to go home." (TR 1058).

The trial court told the jury, "I'm going to ask the clerk to swear all 12 of you again and send you back to *continue* your deliberation;" the court said nothing about starting deliberations anew, as had been suggested. (TR 1059). The new jury was sworn. (TR 1059). It was 6:00 p.m. (TR 1060).

Out of the jury's presence, the court stated that it had not given any oral instructions because it did not think it could. (TR 1059). The court commented,

> But I don't know how to instruct eleven jurors to tell one juror what they've discussed for, Mr. Woody, you said five and a half hours, give or take thirty minutes. I don't know that an instruction is even available to say to eleven people, "You go back there and tell her everything that's happened. Ma'am you pay attention."

(TR 1060).

Approximately ten minutes later (TR 1075, 1076; LF 244), the jury returned with its verdicts finding Mr. Amick guilty of arson and the lesser-included offense of murder in the second degree. (TR 1064). After the jury was polled, the trial court asked Juror 14 if she had sufficient time to go over all the instruction, the evidence, and discuss it fully with the other 11 jurors. (TR 1064). Juror 14 replied, "I pretty much remembered everything that was going on and I really knew how I felt when I came back." (TR 1065).

After the jury was released, defense counsel moved for a new trial. (TR 1075-1076). He noted that the jury had been deliberating for about five and a half hours while Juror 14 was gone, and when Juror 14 joined the deliberation, it took ten minutes or less for the verdicts. (TR 1075). Defense counsel characterized it as a "sham of deliberation"' (TR 1975). Defense counsel argued that there was no way that Juror 14 had time to read through the instructions, listen to the opinions of the other jurors, and reach a conclusion. (TR 1075). Defense counsel noted that Juror 14 had told the court that she remembered the evidence "pretty much," and that she knew what she thought was right before she rejoined the jury. (TR 1075). Defense counsel argued that he could almost guarantee that when Juror 14 left, she did not have it in her mind that Defense counsel was guilty of the lesser offense of murder in the second degree. (TR 1975). There was simply no way that she had time to deliberate or that she did deliberate. (TR 1075. 1076). Juror 14 deliberated for approximately ten minutes before the jury came back with verdict after six hours of total deliberation. (TR 1076).[12]

---

[12] This time frame comes from defense counsel. The record does not show the precise amount of time this second deliberation took. However, the trial court stated that the deliberation with the alternate juror started at 6:00 p.m.. (TR 1059). The next time that appears on the transcript indicated that it was 7:05 p.m. (TR 1074). In this sixty-five minute period between 6:00 p.m. and 7:05 p.m., the jury deliberated, the jury announced its verdict, the trial court questioned the alternate

Defense counsel also believed that Juror 12 was clearly the one holdout, noting that Juror 12 had stated in courtroom that he could not handle the stress and pressure and that the arguing was getting to him. (TR 1076). The trial court denied the motion for mistrial. (TR 1977). This claim of error was raised in paragraphs 58-62 of Mr. Amick's amended motion for new trial. (LF 243-244).

B. Preservation and Standard of Review

The Southern District's slip opinion determined that Mr. Amick's claim was subject to only plain error review. (Slip Opinion at *24-25). The Southern District stated, "Defendant did not assert these alleged constitutional or statutory violations below. Therefore we review only for plain error." (Slip Opinion at *24).

It is true that defense counsel did not specifically mention these provisions below. However, a defendant must merely object "with sufficient specificity to apprise the trial court of the grounds for the objection." *State v. Gustin*, 826 S.W.2d 409, 413 (Mo. App. S.D. 1992), citing *State v. Stepter*, 794 S.W.2d 649, 655 (Mo. banc 1990).

---

juror about her deliberation process, the trial court had a conversation with the attorneys that took up approximately ten pages of the transcript, and the court took a recess. If counsel for Mr. Amick was mistaken about the length of the second deliberation, these numerous events show that the length of the deliberation was nonetheless very short.

Defense counsel *did* object with this "sufficient specificity." Before Juror No. 12 was replaced, for instance, he stated that "to call back Juror No. 14 would create an enormous amount of error at this point." (TR 1042). Next, he stated, "that's not something that we can just substitute in somebody else. It pains me to say that's a mistrial." (TR 1051). Next, defense counsel stated, "And in my opinion, it is basically clear that we have a couple of options. Either a mistrial at this point, or we could potentially break at this point, send the jurors home, instruct them not to discuss the case with anyone . . . We could reconvene after the holiday." (TR 1052). Finally, defense counsel stated, "[a]nd after five and a half or six hours of deliberation, we can't just throw somebody else into the ring. That's not the way it's done, and I think it's either a mistrial or we can break and reconvene on Tuesday morning." (TR 1052).

It is clear from these numerous objections that defense counsel was contesting the procedure the trial court was using. Because defense counsel was objecting to this procedure, his objections were specific enough "to apprise the trial court of the grounds for the objection." *Gustin*, 826 S.W.2d at 413. Defense counsel certainly did not "sandbag" the trial court with this claim by waiting until the jury had returned a guilty verdict to complain about the procedure used. Instead, defense counsel suggested a mistrial was necessary if the juror could not continue. Once defense counsel objected to this procedure, the trial court was on notice that it was required to properly follow the relevant Missouri statutes and constitutional provisions.

Furthermore, "[t]rial judges are presumed to know the law and to apply it in making their decisions." *State v. Finley*, 403 S.W.3d 625, 629 (Mo. App. S.D. 2012), citing *State v. Poole*, 216 S.W.3d 271, 277 (Mo. App. S.D. 2007). Because of this presumption, objecting to the procedure used without naming the specific statute at issue should have been sufficient to preserve this issue for review in the present case.

This Court's interpretation of a statute is a question of law subjected to *de novo* review. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006).

Out of an abundance of caution, if this Court believes that despite defense counsel's several objections made on the record and the inclusion of the issue in his motion for new trial that the issue is not properly preserved for appeal, he requests this Court to review for plain error under Rule 30.20. Claims of plain error under Rule 30.20 are reviewed "under a two-prong standard." *State v. Cable*, 207 S.W.3d 653, 659 (Mo. App. S.D. 2006). First, this Court determines whether there is error that is evident, obvious, and clear. *Id.* If so, then this Court looks to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has occurred as a result of the error. *Id.* at 659-60.

C. Analysis

The Sixth and Fourteenth Amendments to the United States Constitution and Article I section 18(a) of the Missouri Constitution, guarantee a criminal defendant the right to a fair and impartial jury. *State v. C*lark, 981 S.W.2d 143,

146 (Mo. banc 1998). Likewise, the right to a jury trial guarantees a fair trial by a panel of impartial jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). As part of these rights, a litigant has the constitutional right to have all issues of fact submitted to the same jury at the same time. *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991).

States have enacted statutes and rules to protect a defendant's right to an impartial jury by specifically protecting the deliberative process during which a jury reaches its verdict. *State v. Sanchez*, 129 N.M. 284, 6 P.3d 486, 490 (N.M. 2000). Post-submission substitution threatens that process. *Id*. Missouri has such a statute.

The trial court's action violated Section 494.485, which specifically requires that alternate jurors be discharged for all time after the jury retires to deliberate. That statute provides in part:

> Alternate jurors, in the order in which they are called, shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties. … Alternate jurors who do not replace principal jurors *shall be discharged after the jury retires to consider its verdict*.

Id. (Emphasis added).

Here, the jury of twelve had retired to deliberate and had, in fact, deliberated for almost five hours before Juror 12 complained about his health. The alternate juror had been discharged, as required under § 494.485 ("Alternate jurors

. . . shall be discharged after the jury retires to consider its verdict"). This provision, which expressly requires discharge of alternate jurors after submission, clearly establishes a legislature's intent to preclude the use of alternate jurors after submission. *See also Bobo*, 814 S.W.2d at 355 (holding that language in a Tennessee court rule requiring the alternate juror be discharged when the jury retires to consider its verdict means that the discharged alternate is no longer a member of the jury since the function of an alternate juror ceases when the case has been finally submitted).

Further, the plain language of the statute only allows the replacement of a juror with an alternate juror "*prior to the time the jury retires to consider its verdict."* Section 494.485. These two components, read together, clearly require that once deliberations have begun, no substitutions in the jury be made. If statutory language is clear, courts must give effect to the statute as it is written. *M.A.B. v. Nicely*, 909 S.W.2d 669 (Mo. banc 1995). The language of § 494.485 is clear and mandatory. It brooks no alternative procedure. The failure to comply with its mandate is reversible error.

In *State v. Johnson*, 968 S.W.2d 123 (Mo. banc 1998), this Court allowed juror substitution where the juror became ill after the verdict in the guilt phase, but *prior to deliberations* of the penalty phase. *Id.* at 132. This Court stated that the "overriding intent of Section 494.485 is to provide for the use of alternate jurors so as to prevent mistrials caused by the loss of a regular juror." *Id.* This Court went on to note that"[t]he only statutory exception to the use of alternate jurors applies

when deliberations have already begun." *Id.* In *Johnson*, the replacement was allowed because it was "before the jury retire[d] to deliberate." *Id*. That did not happen in Mr. Amick's case.

The Eastern District Court of Appeals reached a similar conclusion in *State v. Williams*, 659 S.W.2d 298, 300 (Mo. App. E.D. 1983). In that case, the alternate was discharged after closing arguments were given. *Id.* at 299. The jury did not begin deliberation right away, but was instead taken to lunch. *Id.* During lunch, one of the jurors became ill. *Id.* After determining the juror could not deliberate, the judge "recalled the alternate who was still in the hallway outside the courtroom." The defendant argued on appeal that his conviction should be reversed because Section 494.065 permits a regular juror to be replaced by an alternate only before the jury retires to consider its verdict. *Id.* at 300. The Eastern District, though, rejected this claim by stating the following:

> Of primary important is that, although the jurors had "retired," they had not retired to consider their verdict. Deliberation on the case was not to begin until after lunch. Therefore, appellant still had the benefit of the full deliberation of twelve qualified and impartial jurors.

Id.

Under the logic of both *Johnson* and *Williams*, the trial court in the present case violated the plain language of section 494.065 by replacing a juror after the jury had been deliberating for several hours. Because Juror 14 only deliberated for

approximately ten minutes of about six hours, Mr. Amick did not really get the jury of twelve to which he was entitled. *Bobo*, 814 S.W.2d at 355-356. As noted in *Bobo*:

> It is clear that thirteen jurors participated in the deliberative process, although only twelve ultimately cast a vote on the issue of guilt or innocence. Moreover, it is not at all certain that the alternate juror who replaced [another juror] took part in all the deliberations. It may be that deliberations began anew once the alternate was reseated. But without an explicit instruction to that effect from the trial judge, we cannot assume that the reconstituted jury panel started from the beginning. Thus, the substitution of jurors after final submission of the case, coupled with the trial court's failure to instruction the jury to begin deliberations anew, violated each defendant right to a trial by jury under [the Tennessee Constitution].

814 S.W.2d at 356.

Courts have held that that this type of error is such that Mr. Amick does not have to prove specific prejudice, and that automatic reversal is required. E.g., *State v. Murray*, 254 Conn. 472, 757 A.2d 578, 591-592 (2000); *Bobo*, 814 S.W.2d at 358; *State v. Lehman*, 108 Wis. 2d 291, 296, 321 No.W.2d 212, 215 (1982); *Cantrell v. State*, 265 Ark. 263, 265-66, 577 S.W.2d 605, 607 (1979); *Woods v. Commonwealth*, 287 Ky. 312, 152 S.W.2d 997, 999 (1941). This is the better view because it is a "structural defect affecting the framework within which the trial

proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984).

In *Cantrell v. State*, the trial court allowed "the alternate juror to be seat after the matter had been under consideration for an hour and a half." 577 S.W.2d at 607. The defendant argued on appeal that this was prejudicial error. *Id.* at 606. The Supreme Court of Arkansas determined that "[t]he answer to this question is plainly visible upon the face of the following Arkansas statute:

> Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examinations and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Id. at 607.[13] In reversing the defendant's conviction, the Supreme Court of Arkansas stated the following:

> The General Assembly could not have chosen words to make it more clear that the alternate juror(s) are discharged when the regular panel

[13] This language is nearly identical to section 494.485, which states that "[a]lternate jurors who do not replace principal jurors shall be discharged after the jury retires to consider its verdict."

> retires to consider its verdict. The statute states the alternate(s) shall be discharged when the regular panel retires to deliberate its verdict. When the jury retired to deliberate, there was then no alternate juror. Whether Evelyn Cloinger had discussed the case with others is of no concern for she was already severed from the case. At this point a mistrial should have been declared by the court because it was no longer possible to have twelve jurors reach a verdict one way or the other, since only eleven jurors remained.

Id.

The Wisconsin Supreme Court reached a similar conclusion in *Lehman*, 321 N.W.2d at 215. In that case, a juror was replaced over objection with an alternate juror when the original juror became ill. *Id.* at 294-95. The defendant argued on appeal that this procedure violated his rights under a Wisconsin statute that states, "[i]f before the final submission of the cause of [sic] regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box." *Id.* at 302. The Wisconsin Supreme Court stated that it "decline[d] to infer from a silent statute that the legislature approves substitution during jury deliberations." *Id.* at 306. The Court further stated that "[t]he decision whether an alternate juror should be permitted to replace a juror who dies, becomes disabled or is otherwise disqualified during the jury's deliberations is a policy decision which should not be made by each circuit court on a case-by-case basis without

any established guidelines." *Id.* at 313. Finally, the Wisconsin Supreme Court held:

> Until there is express authorization permitting a circuit court to substitute an alternate juror during jury deliberations, the circuit court has only three options available to it if a regular juror is discharged after jury deliberations have begun: first, to obtain a stipulation by the parties to proceed with fewer than twelve jurors; second, to obtain a stipulation by the parties to substitute a juror; and third, to declare a mistrial.

Id.

Here, because Mr. Amick objected numerous times to the replacement of Juror No. 12, the trial court had no choice but to declare a mistrial.

Other states have viewed post-submission substitution as error that must be proven harmless by the state and it must be shown that the trial court took sufficient precautions to avoid prejudice. E.g., *People v. Burnette*, 775 P.2d 583, 587-590 (Colo. 1989)(en banc); *Sanchez*, 6 P.3d at 495 (interpreted their state's rule to require reversal unless in the circumstances of a particular case the trial court had taken sufficient measures to protect the defendant's right to proper jury deliberations).

In *People v. Burnette*, the defendant argued his conviction should be reversed because the trial court replaced a juror with an alternate juror once deliberation had begun. 775 P.2d at 585. Colorado had a statute which stated that

"[a]n alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict." *Id.* at 586. The Colorado Supreme Court determined first that replacing a juror during deliberations violated this statute. *Id.* at 587. The Court then determined that violating this statute "raises a presumption of prejudice to the defendant's right to a fair trial . . ." *Id.* at 587-88. The Court wrote about the great potential for prejudice when a juror is replaced during deliberation:

> The potential for prejudice occasioned by a deviation from the mandatory requirements of Crim.P. 24(e) is great. Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger that the new juror will not have a realistic opportunity to express his views and to persuade others. *See United States v. Phillips,* 664 F.2d 971, 995 (5th Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Lamb,* 529 F.2d 1153, 1156 (9th Cir.1975). Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision. *See People v. Ryan,* 19 N.Y.2d 100, 278 N.Y.S.2d 199, 202, 224 N.E.2d 710, 712 (1966). Nor will the new juror have had the benefit of the unavailable juror's views. *Id.* Finally, a lone juror

> who cannot in good conscience vote for conviction might be under great pressure to feign illness in order to place the burden of decision on an alternate. *Lamb*, 529 F.2d at 1156

Id. at 588. The Court went on to write the following:

> Because a just verdict cannot be reached if there is an inappropriate interference with or intrusion upon the deliberative process, *Id.*, the mid-deliberation replacement of a regular juror with an alternate must be presumed to have prejudiced the defendant. Such a presumption can be overcome only by a showing that the trial court took extraordinary precautions to ensure that the defendant would not be prejudiced and that under the circumstances of the case, the precautions were adequate to achieve that result.

Id. at 590. The Court held that State could not overcome this presumption of prejudice in part because the jury had deliberated so long before the jury was replaced. *Id.*at 590.

In *Sanchez*, the court held that the presumption of prejudice created by post-submission substitution remained, even after it considered the measures the trial court took to protect the deliberative process. 6 P.3d at 495. There, the trial court instructed the reconstituted jury to "bring [the alternate juror] up to speed" and also to "start things over again." *Id*. This instruction gave the jury conflicting messages: (1) the original jurors should educate the alternate on each of the jurors'

positions and then continue deliberating; (2) the jury should begin all deliberations anew. *Id*.

In the present case case, the court did not instruct the jury to deliberate anew, believing that such oral instructions should not be given. In fact, the court did the opposite and told the jury to "*continue* your deliberation" (TR 1059-1060), which in essence told the jury *not* to start deliberations anew.

In *Sanchez*, the court noted in that case that the lapse of time between the first and second periods of deliberation might have facilitated the jury's ability to begin deliberations anew. *Id*. Nevertheless, the second alternate had not been retained during deliberations and he was not re-examined on his ability to serve as a juror. *Id*. The court did not question the reconstituted jury on its ability to deliberate anew; nor did the court re-instruct the jury on the elements of the crimes charged. *Id*. The court concluded the trial court's measures were not sufficient to protect the defendant's right to trial by jury, particularly the right to a verdict properly reached. *Id*.

In the present case, the first jury deliberated for almost six hours, then the substitution of jurors was made, and the verdict by the newly constituted jury was rendered in approximately ten minutes. The alternate had not been retained during deliberations, rather had been sent home where she talked to three people about the case, although not the "facts" of it. (TR 1044, 1048). When initially discharged as an alternate, this juror had told the court that she was "pleased to be dismissed." (TR 1025). When she was told that she would have to drive back to the

courthouse, she told the court, "this is my worst nightmare." (TR 1045). After the verdict, the alternate juror when asked whether she had sufficient time to go over all the instruction, the evidence, and discuss it fully with the other eleven jurors, she stated, "I *pretty much* remembered everything that was going on and I really knew how I felt when I came back." (TR 1064-1065).

Defense counsel also believed that Juror 12 was clearly the one holdout, noting that Juror 12 had stated in courtroom that he could not handle the stress and pressure and that the arguing was getting to him. (TR 1076). Clearly, he was the lone holdout and the other eleven were trying to pressure him, and according to Juror 12, he could not handle the pressure. (TR 1076).

As in *Burnette* and *Sanchez*, the trial court's measures here were not sufficient to protect the defendant's right to trial by jury, particularly the right to a verdict properly reached. *Id*.

Mr. Amick was denied the full panel of the twelve jurors to which he was entitled, with full deliberation of the same twelve jurors throughout the case as required under the constitution and Section 494.485. The result was a structural error that affected the very framework of the trial. *Bobo*, 814 S.W.2d at 358; *Fulminante*, 499 U.S. at 310. In addition, the state has not proven the error harmless, and the trial court did not take sufficient precautions to avoid prejudice. Mr. Amick must receive a new trial.

Point II.

The trial court plainly erred in not *sua sponte* declaring a mistrial after the Assistant Attorney General accused defense counsel and Mr. Amick's family of "creating a fraud in this court," changing license plates on a truck and taking a photo of it, being "corrupt and deceitful," "showing photos of a truck with Mr. Amick's license plate that is not Mr. Amick's truck," "tampering with evidence," committing "a crime," "hindering prosecution," engaging in "fraudulent behavior; defense counsel "misleading" the jury, not telling the jury everything, getting "caught with their pants down," and, not telling "the full truth, which they have yet to do," because Mr. Amick was thereby denied his right to due process and a fair trial, as guaranteed by the 14th Amendment to the U.S. Constitution and Article I, section 10 of the Missouri Constitution, in that the State's argument improperly made unwarranted, unsupported personal attacks on defense counsel and Mr. Amick's family, and referred to facts not in evidence, resulting in a manifest injustice.

A. Facts

During defense counsel's cross-examination of Jake Mayberry, who allegedly saw Mr. Amick's truck at the victim's home shortly before the home caught on fire, the following occurred:

Q (By Mr. Wampler) Let me show you a couple of photographs marked

Defendant's Exhibits A and B.

(Mr. Wampler offered Exhibits A and B to Mr. Zoellner and conferred outside of the hearing of the court reporter.)

Q (By Mr. Wampler) Going to hand you what's been marked as Defendant's Exhibits A and B. (Handing) Take a look at those exhibits and I want to ask you if you can identify those exhibits.

A No, sir. I can't.

Q You can't, is that right? Cannot?

A Cannot.

Q Did you hear the prosecutor say a minute ago that wasn't the truck? Did you hear him say that they (sic)?

A Yes, I did.

Q Okay.

A But that's not what I based my answer on.

Q All right. Okay. I was going to show you A and B, and that's a similar pickup truck to Mike's, is that right, but that's not Mike's truck?

A Right. That's got a full four doors.

Q But you heard the prosecutor say that's not the truck, audibly, didn't you?

A Yes, I did hear him.

Q Okay. Got tipped off on that one. All right. Let's go to something else. The vehicle that you saw on that date in question, did it have two doors or four doors?

A Two doors.

Q It had two doors?

A With the handles and all.

(TR 325-326).

Later during the trial, out of the jury's hearing, as the assistant attorney general was complaining about alleged discovery violations, the following colloquy occurred:

MR. ZOELLNER: As we were discussing at the bench, this is now the fourth piece of evidence that the Defendant has proffered that has not been disclosed pursuant to the court rules.[14] They are required to disclose to the State any exhibit they intend to offer into evidence. Now, two of these were photocopies of a truck that they have purported and tried to get a witness to say is Michael Amick's truck. It's not. In depo –and I'll tell you by way of history, which I think is just absolutely dirty pool, they switched that

---

[14] Mr. Amick disputes that there was any discovery violation, but there was no issue raised in the motion for new trial concerning the alleged discovery violations, so it is not discussed in this brief and whether there were such violations is not relevant to the disposition of this point.

license plate from Michael Amick's truck to another truck trying to get a witness to say that that's the truck. Okay? It's the wrong truck, and I think that's dirty pool to begin with, Judge. . . .

MR. WAMPLER: Let me say that I filed a disclosure or request, an answer, and this statement about, quote, dirty pool, that's an insinuation of unethical conduct and *I would like for him to make an offer of proof that I as a counsel, or Adam Woody, has played dirty pool and done something unethical. I would like to have evidence of that*. ….

* * * * *

MR. ZOELLNER: And Judge, if I may, he asked—quite frankly, Mr. Wampler, it wasn't you with the deposition, it wasn't Mr. Woody. It was Mr. Pasanisse who represented State's Exhibit 7 and 8 by asking the witnesses if these were photographs of Mr. Amick's truck. And the witness and officer said, "It looks like it." Well, when you look at it and you look at the fender wells, it is not Mr. Amick's truck. And I don't got a problem if you want to show a photograph to a witness like that. The dirty pool part is taking the license plate off this truck that is Mr. Amick's and putting it on here, is what I'm referring to is -- I don't – I'm sorry. I don't -- And I can get the other photographs. It's not the most ethical behavior, and I Don't know if it's you, Woody or Mr. Pasanisse.

MR. WAMPLER: Methinks he does protest too much. No evidence, just his insinuations. This is the Defendant's truck. The exhibit here in the

deposition is, as I understand it, the Defendant's truck. And Exhibit 11 possibly is also the Defendant's truck, also. That's their exhibit, so I don't understand what he's complaining about. Nobody has switched any license plates. Nobody has.

MR. ZOELLNER: And, Judge, we're back to what my complaint is. Whether it's for use in cross-examination or during their case in chief, if you refer to it that way, they are required under the rules to provide me with these items and they have not done so.

THE COURT: Court agrees with you, and I believe both of you know the rules well enough that we can follow that. Okay? Anything else on the record?

MR. ZOELLNER: Well, I'm simply asking you, Judge, to instruct them if there are additional items that they intend to use in any form of the trial --

THE COURT: The defense is so instructed at this time. Anything else?

MR. ZOELLNER: Nothing for us, Judge.

THE COURT: We're going off record.

MR. WAMPLER: Yes.

THE COURT: Either that or bring a bucket in here. Court will be in recess for a few minutes.

(TR 561-563).

During the assistant attorney general's closing argument the following occurred:

So now [Jake Mayberry is] lying because on this date this photo doesn't show a completely shiny rim. That's – That's not lying. Jake said it had an extended cab. They say it has four doors. *I don't know what it has*. And we'll get to that in a minute, because the photos they have, you haven't had a chance to look at. *Ladies and gentlemen, they're creating a fraud in this court. That isn't their truck. That isn't the truck. And I'll – I'll give you these photos and let you look at it and you can see for yourself, different truck. They changed the plates. And if they wanted to prove it was the truck, show me a vehicle identification number that matches up.*

(TR 993-995) (Emphasis added).

…Sloppy police work means you don't find the gun. Okay? But we found it. You know what, though? They aren't corrupt. They aren't deceitful. But there is (sic) some people in here that have been corrupt and deceitful, and it's his family.

Ladies and gentlemen, we've talked about this truck.

May I see your exhibits of the truck, please?

Deanna has it all wrong. We're not wanting photos of the truck to go show our witness to get a story right. His story is what it is. It's written down and it's documented in a transcript. We're not trying to change that. *What we want to know is why, back in May of '09, they're showing photos of a truck with Michael's license plate that is not Michael's truck. That's called tampering with evidence, ladies and gentlemen. It's a crime.*

Hindering prosecution is a crime. Because way, way back then, these photos are being shown to witnesses in this case, and they're going to be shown to you, and Chris Amick sat here and vouched for him that this was his truck. But you know what? Where's the VIN number to prove it? Where's the VIN number to prove it?

THE CLERK: Five minutes.

MR. ZOELLNER: Now, ladies and gentlemen, if you'll look really closely, this is the wheel of that truck that was taken that night. I don't know what you call it, but there's a black -- and I wish they had taken better photos, but they didn't – there's a black fender well here, molding. Okay? That's his truck, taken that night at his house. His license plate.

When you get back and look at Q and R, all four wheels pristine fender wells, nothing on there black. You can't pull that off without tearing it. You've got to go fix it all. Okay? *These have been altered.* And you say, well, Zoellner, it's no big thing, they took off the black to make it look better, they liked it better. Well, that's fine. That's fine. Okay.

You don't hide it in Arkansas, like you heard from Deanna. They're hiding it. She's proud of the fact that her and her family hid it. Would do it again to protect one of their own. But you know what? If you look really closely, there's molding up here high on the door that runs the length of it that doesn't match up to the little bit of molding and shape here. And you can take these back in your jury room and look at them.

Ladies and gentlemen, he's guilty, they know it, and they're trying to cover it up and they're trying to get witnesses like Jake Mayberry -- remember when they tried to show them some other photos that aren't even in evidence now and confuse him? Ladies and gentlemen, this is -- the cops aren't corrupt. The Defendant and his family is.

(TR 997-999).

The reality of the case is what's coming from the witness stand, not from these fellows' [defense counsels'] mouths. *And, quite frankly, I am kind of tired of them misleading you and not telling you everything*. "Where's Kass Brazeal? Where's Kass Brazeal?" Well, Eric King told you he and Kass were there, they were looking at the scene. Kass took those photographs, and those are the photographs. Well, we should have produced Kass. Well, under the law we don't have to. Actually, we could still be here with witnesses going through all this minutia if they want us to. But Eric said those are the photographs. But Kass has been out in the hall for three days, under their subpoena. And you know what, Kass was the one here that they were going to start this nonsense with about this truck. This -- *- These are from his depo way – and the photographs were taken way back in May of '09. That's why Kass didn't get to the stand, because they got caught with their pants down.*

Now, I don't know if Mr. Woody and Mr. Wampler were in on this fraud, but I know the Amick family is. And it's about time the defense

> *attorneys tell you the full truth, which they have yet to do.* Kass Brazeal is not here. Why didn't they bring Kass? We didn't need to. We brought you the witnesses we could bring you, to show you what happened, without all this confusing nonsense and noise.

(TR 1020-1022).

> Ladies and gentlemen, you, you are the voice of the community. Mr. Wampler's opinion and my opinion and Mr. Dowdy's, Fred's, opinion, they don't matter. Sheriff Moore, Sheriff Underwood now, Eric King, Kass Brazeal, their opinion doesn't matter. Chris Amick, his mom, their witness, their opinions don't matter. The 12 of you opinion matter. The 12 of you will stand in place of our community, this community, and *decide whether we're going to tolerate fraudulent behavior on the Court like this* and whether we're going to tolerate crimes like this.

(TR 1024).

B. Standard of Review

Trial courts have wide discretion in controlling closing arguments, but they abuse that discretion when they allow plainly unwarranted and injurious arguments**.** *State v. Thomas*, 780 S.W.2d 128, 135 (Mo. App. E.D. 1989). An appellate court will reverse a conviction on the grounds of improper argument if the defendant establishes that the comments had a decisive effect on the jury's

verdict or that the argument was "plainly unwarranted." *State v. Petty*, 967 S.W.2d 127, 135 (Mo. App. E.D. 1998).

But where there is no objection made to a closing argument, the claim of error must be reviewed under the plain error standard under *Rule 30.20*. Plain error is only found in closing argument if the improper argument had a decisive effect on the jury, and that manifest injustice will occur if the error is not corrected. *State v. Davis*, 566 S.W.2d 437, 446-447 (Mo. banc 1978); Rule 30.20.

Claims of plain error under Rule 30.20 are reviewed "under a two-prong standard." *State v. Cable*, 207 S.W.3d 653, 659 (Mo. App. S.D. 2006). First, this Court determines whether there is error that is evident, obvious, and clear. *Id.* If so, then this Court looks to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has occurred as a result of the error. *Id.* at 659-60. Improper closing arguments can inject such "poison and prejudice" into a case that relief under plain error is necessary." *State v. Burnfin*, 771 S.W.2d 908, 912 (Mo. App. W.D. 1989).

C. Analysis

While it is the prosecutor's duty vigorously and fearlessly to prosecute in behalf of the state, the prosecutor is also chargeable with the duty to see that the defendant gets a fair trial and the prosecutor must not knowingly prejudice the right of the defendant to a fair trial by injecting into the case prejudicial and incompetent matters. *State v. Evans*, 820 S.W.2d 545, 548 (Mo. App. E.D. 1991).

Prosecutorial misconduct may become unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Further, "[a]n accused, whether guilty or innocent, is entitled to a fair trial, so it is the duty of the trial court to see that he gets one…." *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo. banc 1947). A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct." *U.S. v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, concurring).

Mr. Amick did not get a fair trial. It is improper for the state to argue facts outside the record. *State v. Nelson*, 957 S.W.2d 327, 329 (Mo. App. E.D. 1997) ("A prosecutor's arguing facts outside the record is improper and highly prejudicial."). It is also improper for the state to make an unwarranted personal attack on defense counsel. *State v. Greene*, 820 S.W.2d 345 (Mo. App. S.D. 1991). The assistant attorney general's argument in the case violated both of these well-settled principles, resulting in a manifest injustice.

During closing argument, the assistant attorney general accused defense counsel and Mr. Amick's family of "creating a fraud in this court," (TR 993), changing license plates on a truck and taking a photo of it (TR 993-994), being "corrupt and deceitful,"' (TR 998), "showing photos of a truck with Michael's license plate that is not Michael's truck," (TR 998), "tampering with evidence," (TR 998), committing "a crime," (TR 998), "hindering prosecution," (TR 998),

and in engaging in "fraudulent behavior" (TR 1024). The assistant attorney general also accused defense counsel of "misleading" the jury and not telling them everything (TR 1022), getting "caught with their pants down," (TR 1022), and defense counsel not telling "the full truth, which they have yet to do," (TR 1022).

There was no evidence to support this assault on defense counsel or Mr. Amick's family.[15] There was no evidence that either defense counsel or Mr. Amick's family had changed license plates on a truck and took photos of it. (TR 993-994). There was no evidence that defense counsel or Mr. Amick's family had shown "photos of a truck with Michael's license plate that is not Michael's truck." (TR 998). There was no evidence that they were guilty of "tampering with evidence," (TR 998), committing "a crime," (TR 998), or "hindering prosecution," (TR 998). There was no evidence that defense counsel was guilty of "misleading" the jury, not telling the jury everything, and not telling "the full truth." (TR 1022).

During a bench conference when the assistant attorney general made the accusations to the court against defense counsels, one of them challenged the assistant attorney general to make an offer of proof and present evidence that any

---

[15] There was evidence that Mr. Amick's family had moved Mr. Amick's truck so that Jake Mayberry could not view new, better, photographs of it and get his description of the suspect truck correct, but that is not fraudulent, criminal behavior as asserted by the State. And there was no evidence that defense counsel was involved in that action.

of the defense attorneys had done anything unethical. (TR 561). Significantly, the assistant attorney general presented no evidence and made no offer of proof. This implies that the assistant attorney general had no such evidence.

Defense counsel also asserted that the particular photographs referred to by the assistant attorney general were photographs of Mr. Amick's truck and that nobody had switched any license plates. (TR 563). The assistant attorney general again presented no evidence and made no offer of proof to contradict defense counsel. If the State had such evidence, it should have presented it to the court first and then to the jury, if the court held the evidence admissible; this would allow Mr. Amick the opportunity to refute the accusations. Instead, the assistant attorney general became an unsworn witness, arguing things to the jury that defense counsel specifically denied to the court during the bench conference, and which when challenged by defense counsel to present evidentiary support for the accusations, the State did nothing.

Missouri courts have condemned arguments made without evidentiary support in the record that were far less egregious than what happened here. For instance, in *Nelson*, *supra*, defense counsel asserted in his opening statement that the victims willingly accompanied the defendant to St. Louis. 957 S.W.2d at 329. The prosecutor objected to this assertion, arguing at a bench conference that this evidence was inadmissible since defense counsel did not intent to call any witnesses, and the defendant's statement that he made to the police was inadmissible. *Id.* The trial court sustained this objection, but when defense counsel

resumed his opening statement, he told the jury that the defendant would testify, and that he was ready to take responsibility for his actions. *Id.* During the prosecutor's closing argument, the prosecutor argued that the defendant took the stand not to take responsibility, but instead because the statement he gave to the police officer was not going to come into evidence. *Id.* at 329. The prosecutor also told the jury about the substance of the bench conference held during defense counsel's opening statement. *Id.* The Eastern District pointed out that the statement the defendant made to the police was not in evidence, and the prosecutor was therefore arguing facts outside the record. *Id.* The Court held that the prosecutor's closing argument was improper. *Id.* at 330. Furthermore, the Court held that the argument was prejudicial "because it focused on and denigrated the sole defense to the charge of murder in the first degree." *Id.*

In *State v. Storey*, this Court reversed the defendant's death penalty punishment based in part on comments made by the prosecutor during his closing argument. 901 S.W.2d 886, 900-03 (Mo. banc 1995). In that case, the prosecutor argued, "[b]ut, that's not what this case is about. This case is about the most brutal slaying in the history of this county." *Id.* at 900. This Court pointed out that "[a] prosecutor's assertions of personal knowledge . . . are 'apt to carry much weight against the accused when they should carry none' because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Id.* at 901, quoting *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court further stated that "[a] prosecutor's statement of personal opinion or belief not drawn from the evidence

is improper." *Id.*, citing *State v. Jackson*, 499 S.W.2d 467, 471 (Mo. 1973). This Court held that there "was no evidence about the brutality of other murders in the county, and thus, the prosecutor's argument was improper."

In the present case, the State based its entire theory of fraud on possible minor differences between the State's pictures (Exhibits 9-11) and pictures offered into evidence by counsel for Mr. Amick (Exhibits Q and R). The State first argued that its own pictures showed a black fender well above the tire, while Mr. Amick's pictures did not. (TR 998-999). However, the State's pictures were taken at night, while Mr. Amick's pictures were taken during the day. The State next argued that there was a difference in the molding on the truck's door. (TR 999). Appellate counsel for Mr. Amick has not been able to find any witness who testified about this difference, and he is further unable to notice any difference when examining the different pictures.

It is unclear why the State felt Mr. Amick's family and attorneys would resort to fraud here since the biggest questions involving the truck were whether it had two or four doors and whether it has shiny rims. (TR 249). However, the State's own picture shows that the truck did not have shiny rims. (Ex. 11). Furthermore, two of the State's witnesses (Jackie Risner and Oregon County Chief Deputy Eric King) testified that Mr. Amick's truck had four doors. (TR 380, 549). Furthermore, the State introduced into evidence the Missouri Department of Revenue records for the truck (Exhibit 32), and an examination of the VIN, 1GCGK23R0YF411132, reveals that the seventh character, which shows the body

style, has a "3" which represents a four-door cab. *See* service.gm.com/dealerworld/ vincards/pdf/vincard00.pdf.

The State went beyond these possible minor differences, though, when it implied to the jury that it had additional evidence that Mr. Amick's family and defense counsels had engaged in fraudulent, criminal conduct by manipulating photographs of Mr. Amick's truck. For instance, the State reminded the jury that a man named Kass Brazeal took the State's exhibits of Mr. Amick's truck. (TR 1022). The State then told the jury that Mr. Amick did not have Mr. Brazeal testify because "they got caught with their pants down." (TR 1022). This was clearly outside of the record and amounted to the assistant attorney general testifying.

Earlier, the State told the jury, "[w]hat we want to know is why, back in May of '09, they're showing photos of a truck with Michael's license plate that is not Michael's truck. That's called tampering with evidence, ladies and gentlemen. It's a crime. Hindering prosecution is a crime." (TR 998). This statement implies that the assistant attorney general had some special knowledge that Mr. Amick's family and attorneys were caught using committing fraud. However, there is no evidence that this is true. Furthermore, as previously stated, the assistant attorney general declined to make an offer of proof regarding fraud during a bench conference when asked to by counsel for Mr. Amick. (TR 561).

The State's arguments also constituted error because Missouri case law clearly holds that personal attacks on defense counsel by the State are improper

and objectionable. *Greene, supra*; *State v. Hornbeck*, 702 S.W.2d 90 (Mo. App. E.D. 1985); *State v. Spencer*, 307 S.W.2d 440 (Mo. 1957).

The Southern District condemned a similar argument in *State v. Greene*, 820 S.W.2d at 345. In that case, defense counsel stated during closing argument that "we don't even know who the snitch is." *Id.* at 346. During the prosecutor's closing argument, he implied to the jury that defense counsel had lied to or misled the jury with this statement. The prosecutor argued, "He knew who it was." *Id*. at 346. The prosecutor further told the jury that defense counsel knew before the prosecutor did and that defense counsel had pointed it out in the hall that day, yet defense counsel had told the jury that he did now know. *Id*. However, the Southern District pointed out that in context, defense counsel's comment "may have been referring to there being no evidence of who the informant was." *Id.* at 347. Although the trial judge sustained defendant counsel's objections, the trial court refused to instruct the jury to disregard the argument. *Id*.

The Southern District found the prosecutor's argument to be improper: "[s]aying defense counsel lied or intentionally attempted to mislead the jury without a basis in the record cannot be allowed." *Id*. The Court reversed the defendant's conviction, finding that "[a]lthough there was substantial evidence of guilt, and the sufficiency of the evidence was not questioned, the unsupported statement that defense counsel was lying to the jury is so serious and potentially prejudicial that it might have affected the juror's deliberation." *Id*.

In *Hornbeck*, the prosecutor told the jury during closing that that "Jerry Hornbeck and his lawyer knew as of September 7th, 1983, that Myra Adams was a State witness and on September 17th they took measures to make sure Myra Adams would not be on the witness stand." 702 S.W.2d at 92-93. The Eastern District determined that this argument went "far beyond the wide latitude accorded counsel during argument." *Id.* at 93. The Court further stated that "[d]efense counsel stood accused of conspiring to commit a crime." The Court reversed the defendant's conviction, holding that "[b]y failing to sustain defense counsel's objection and by failing, *sua sponte*, to admonish the prosecuting attorney for his improper argument, the trial court permitted the jury to speculate on defense counsel's complicity in the crime charged." *Id.*

The Court also reversed convictions for improper attacks on defense counsel in *State v. Harris*, 662 S.W.2d 276 (Mo. App. E.D. 1983) (argument that prosecutor first learned of defense while case was being tried, and that defense was created during trial, implying defense counsel had suborned perjury and fabricated defense was improper); and *State v. Spencer*, 307 S.W.2d at 446-47 (argument that defense counsel "browbeat the witnesses" was highly improper and conveyed the idea that defense counsel "had acted improperly during the trial").

The arguments by the assistant attorney general in this case are worse than these previous cases. There was no basis in the record for the State to argue that defense counsel and Mr. Amick's family had engaged in fraud, changed a license plate, tampered with evidence, committed "a crime," hindered prosecution,

engaged in fraudulent behavior, misled the jury, and not told the "full truth." Thus, as in these cases, the assistant attorney general's allegations were improper and made without any evidentiary support. The assistant attorney general chose not to make an offer of proof regarding fraud when given the chance. The assistant attorney general also neglected to file a motion under rule 25.06 for defense counsel to produce the truck. Defense counsel was instead blindsided with the argument that the pictures of the truck he admitted into evidence were not in fact pictures of Mr. Amick's truck.

The improper, unprofessional, arguments resulted in a manifest injustice because they went to the heart of the matter. The evidence produced by the State that Mr. Amick was the murderer was Jake Mayberry's testimony that he saw Mr. Amick's truck at the victim's home minutes before the fire started (TR 297, 312). Thus, the State's case was dependent upon Mr. Mayberry correctly identifying Mr. Amick's truck. If Mr. Mayberry made an incorrect identification of the truck, then there was no evidence that Mr. Amick was at the crime scene when the victim was killed.

Mr. Mayberry was certain that the suspect vehicle was a two-door, extended cab truck (TR 311-312, 326-327). But the great weight of the evidence, contrary to the assistant attorney general's statement "*I don't know what it has*" (TR 994), was Mr. Amick's truck was a four-door, crew cab truck, as established by several witnesses: Jackie Risner, the victim's daughter (TR 380); Oregon County Chief Deputy Eric King (TR 549); Linda Amick (TR 749); and Chris

Amick (TR 909-911; Exhibits Q and R), as well as the VIN, which was introduced into evidence by the State (Exhibit 32). Ms. Risner and Officer King were State's witnesses. (TR iv-v). Mr. Mayberry was the only person who testified that Mr. Amick's truck had two doors.

Thus, the State's argument, which was unsupported by any evidence, that the defense counsel and Mr. Amick's family had fraudulently and criminally tampered with evidence and, by implication if not expressly, presented false photographs that Mr. Amick's truck had four doors instead of the two doors testified to by Mr. Mayberry was manifestly unjust because the question of whether Mr. Amick's truck had four doors instead of two doors was highly important, and any false assertion that defense counsel and Mr. Amick's family engaged in criminally fraudulent activity to hoodwink the jury about the truck resulted in a miscarriage of justice.

For the foregoing reasons, Mr. Amick respectfully requests that this Court reverse his convictions and remand this case for a new trial.

Point III.

The trial court plainly erred by abandoning its duty of neutrality and injecting itself in the proceeding when it commented in the jury's presence that the State's only eyewitness (Jake Mayberry) had "answered consistently each time" he had been asked to describe the truck he saw at the victim's home, which was the sole means of identification, and that Mayberry had "established he can describe the vehicle," in violation of Mr. Amick's right to due process of law, as guaranteed by the 14th Amendment of the United States Constitution and Art. I, section 10 of the Missouri Constitution, in that the trial court's comments on the evidence were inherently prejudicial and added substantive support to the State's case and Mayberry's credibility and ability to identify the truck, the lynchpin of the State's case, resulting in a manifest injustice.

A. Facts

During the State's examination of its witness Jake Mayberry, the following occurred:

> Q But you know without a doubt in your mind it was his truck?
>
> MR. WAMPLER: He's leading this witness, and also that's a cumulative, repetitive question Your Honor.
>
> THE COURT: As to leading, sustained.
>
> MR. WAMPLER: Thank you.

Q (By Mr. Zoellner) Was there any doubt in your mind as you drove by --

MR. WAMPLER: Asked and answered three times now, Your Honor. It's repetitious and he is basically trying to rehabilitate his own witness by asking three times.

THE COURT: He's answered consistently each time so he's not rehabilitating, but your objection is sustained.

MR. ZOELLNER: Judge, I'll move on. I'm not trying to delay things here.

MR. WAMPLER: Well, the objection is sustained, Your Honor. Ask that the prosecutor be asked not to ask these questions over and over again.

THE COURT: He's established he can describe the vehicle.

MR. WAMPLER: Thank you.

THE COURT: Proceed.

(Tr. 299).

B. Standard of Review

Defense counsel did not object to this error, thus review is therefore for plain error. *State v. Johnson,* 220 S.W.3d 377, 383 (Mo. App. E.D. 2007). Under the plain error standard, in order to reverse there must be plain error affecting a substantial right that results in manifest injustice or miscarriage of justice. *Id.*, Rule 30.20. Plain errors are evident, obvious, and clear and the existence of such errors are determined by the facts and circumstances of each case. *Id*.

Mr. Amick is entitled to plain error relief to prevent this manifest injustice. Although this Court might be hesitant to grant plain error relief without an objection by defense counsel,[16] this appears to be one of those few areas where plain error review is granted. *See, State v. Bearden*, 748 S.W.2d 753, 756 (Mo. App. E.D. 1988) (plain error review granted where the trial court stated, while overruling an objection to the State arguing facts not in evidence, "the witnesses would have testified favorably for the State"); *State v. Houston*, 139 S.W.3d 223, 230 (Mo. App. W.D. 2004) (plain error occurred due to trial court's interruptions and expressions of frustration with *pro se* defendant); *State v. Embry*, 530 S.W.2d 401 , 404-05 (Mo. App. E.D. 1975) (plain error review granted because "we cannot say the jury did not construe the trial court's conduct adversely to the defendant, and the defendant's right to be tried by an obviously impartial judge [is] fundamental to our system of justice").

C. Analysis

"The law prohibits the trial court from commenting on the evidence. It must remain impartial." *Bearden*, 748 S.W.2d at 756. A question or comment from a trial judge must not express his or her opinion as to the evidence. *Houston*,

[16] Because defense counsel made several requests for a mistrial, this is not a situation where defense counsel might not have objected because he believed that the jury was a favorable one.

139 S.W.3d at 227. This includes even implicit expressions through suggestive conduct or remarks. *Id.* It is fundamental that the trial court shall not sum up or comment on the evidence. *State v. Lomack*, 570 S.W.3d 711, 713 (Mo. App. St.LD. 1978) (reversible error where the court commented, "He never said he was running;" such error was not cured by instruction that jury should not consider judge's remarks as evidence).

When the trial court comments on the evidence, and adds substantive support of the State's case and supports the credibility of the State's witnesses, "[s]uch comments are inherently prejudicial." *Bearden*, 748 S.W.2d at 756. Plain error relief is appropriate in such situations even absent an objection because an immediate objection would likely have no effect since the entity ruling the objection (the trial court) is the same as the one that made such instantaneous comments. *Id.*

In *State v. Bearden*, the prosecutor respondent to defense counsel's argument that he should have called more witnesses by asserting any additional officer would have testified consistently with the witness he did call. 748 S.W.2d at 755. Defense counsel objected, stating "[t]here could have been several stories. This is police work, they were endorsed." *Id.* The Court overruled the objection, stating "If you wanted to,–they were equally available to you. *The witnesses would have testified favorably for the State. Detective Heitzler was one of six or seven officers who were present and their testimony would have been favorable for the State*." *Id.* (emphasis in original). The Court acknowledged that no objection was

made to these comments and that the issue was not raised in the defendant's motion for a new trial. *Id.* The Court nonetheless reversed the defendant's conviction, finding that "[t]he court's comments on the evidence added substantive testimony in support of the state's case and supported the credibility of the state's witnesses." *Id.* at 756. The Court further held that "[s]uch comments are inherently prejudicial plain error," and that "[b]ecause these were extraneous comments of the court, an immediate objection would have had no effect." *Id.*

A manifest injustice has similarly resulted here. No one saw Mr. Amick at the scene of the crime. Mr. Amick did not confess. There was no evidence that Mr. Amick ever had the murder weapon. Jake Mayberry's testimony that he saw Mr. Amick's truck at the victim's home minutes before the fire started was therefore crucial to the State's case. (Tr. 297, 312). The State's case was dependent upon Mr. Mayberry correctly identifying Mr. Amick's truck; without this identification, the evidence would have been insufficient to support Mr. Amick's convictions since there was no other evidence placing him at the scene. In fact, if the truck Mr. Mayberry saw was *not* Mr. Amick's truck, no jury would have convicted Mr. Amick of these crimes.

But Mr. Mayberry's testimony was impeachable. He was certain that the suspect vehicle was a two-door, extended cab truck (Tr. 311-312, 326-327). But Mr. Amick's truck was a four-door, crew cab truck, as established by several witnesses: Jackie Risner, the victim's daughter (Tr. 380); Oregon County Chief Deputy Eric King (Tr. 549); Linda Amick (Tr. 749); and Chris Amick (Tr. 909-

911; Exhibits Q and R). Mr. Mayberry was the only person who testified that Mr. Amick's truck had two doors.

His identification of the truck was suspect for other reasons too. He saw the truck for mere seconds while driving 45 MPH and the truck was about 30-50 yards from the road (Tr. 329-331, 345-346, 354, 355-356). Furthermore, Mr. Mayberry testified that he saw the suspect truck about 11:00 a.m. (Tr. 292-293, 297), but the town's postmaster, an unbiased witness, testified that Mr. Amick was miles away from the crime scene between 10:49 and 11:05 a.m., and the postmaster was able to verify the time range through the cell phone records of a customer. (Tr. 811, 813, 815-816, 823).

Thus, the trial court's impermissible bolstering of Mr. Mayberry's testimony, telling the jury that the court believed that Mr. Mayberry had "established he can describe the vehicle" and that Mr. Mayberry had "answered consistently each time" he described the truck (Tr. 299) were "inherently prejudicial" comments on the evidence that supported the State's case and Mr. Mayberry's credibility, resulting in a manifest injustice. *Bearden*, 748 S.W.2d at 756. Although the trial court did not directly state a belief in Mr. Amick's guilt, such a belief could be implied from its comments supporting the state's theory of prosecution – that it had proven Mr. Amick was guilty because Mr. Mayberry had "consistently" "established" that Mr. Amick's truck was at the crime scene just before the fire broke out.

Because the trial court plainly erred in abandoning its duty of neutrality by commenting on Mr. Mayberry's testimony, adding substantive support of the State's case and Mr. Mayberry's credibility, these comments were inherently prejudicial. *Bearden*, 748 S.W.2d at756. Mr. Amick's convictions must be reversed and the cause remanded for a new trial.

CONCLUSION

A new trial is required because an alternate juror was allowed to join the jury after she had been excused, left the courthouse for hours, talked to others about the case, and only deliberated for approximately ten minutes of the total six hours of deliberation, even though under § 494.485, alternate jurors must be *discharged* after the jury retires to consider its verdict and the statute only allows the replacement of a juror with an alternate juror "*prior to the time the jury retires to consider its verdict."* (Point I).

Mr. Amick is entitled to a new trial because the state, without evidence to support the argument, accused defense counsel and Mr. Amick's family of "creating a fraud in this court," being "corrupt and deceitful," "tampering with evidence," committing "a crime," "hindering prosecution," engaging in "fraudulent behavior, "misleading" the jury, and not telling the jury "the full truth." (Point II).

Mr. Amick is entitled to a new trial because the trial court abandoned its duty of neutrality and injected itself in the proceeding when it commented in the jury's presence that the state's only eyewitness (Jake Mayberry) had "answered consistently each time" he had been asked to describe the truck he saw at the victim's home, which was the sole means of identification, and that Mayberry had "established he can describe the vehicle." (Point III).

Respectfully submitted,

/s/ Samuel Buffaloe

_____

Samuel Buffaloe, MO Bar No. 63736
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Building 7, Suite 100
Columbia, MO 65203
(573) 777-9977
Fax (573) 777-9974
Email: Sam.buffaloe@mspd.mo.gov

Certificate of Compliance and Service

I, Samuel E. Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 18,877 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 31st day of October, 2014, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Greg Barnes, Assistant Attorney General, at Greg.Barnes@ago.mo.gov.

/s/ Samuel Buffaloe

_____

Samuel Buffaloe, MO Bar No. 63736